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No. 96-7151

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

DEBRA FAYE LEWIS,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. PETITIONER WAS NOT PROPERLY CHARGED AND CONVICTED UNDER THE ASSIMILATIVE CRIMES ACT AND THE LOUISIANA FIRST DEGREE MURDER STATUTE.

The government argues that petitioner, DEBRA FAYE LEWIS, was properly charged and convicted of Louisiana first degree murder under the Assimilative Crimes Act (ACA). The question is whether the federal government can charge, prosecute, and convict a defendant under an assimilated state criminal statute whenever an existing federal criminal statute proscribes and punishes the same conduct. The answer is that it cannot. In brief, the government states "in our view, a state offense is 'made punishable' by an act of Congress for purposes of the ACA only when a substantive federal statute focuses directly on the specific class of conduct that constitutes the state offense." (Reply br. 17)

What does this statement mean? If both federal and state criminal statutes make homicide (murder) punishable, has Congress "focus[ed] directly on the specific class of conduct that constitutes the state offense"? The answer obviously is that it has; therefore, the state criminal statute cannot be assimilated. The government's position focuses on the fact that if a substantive state criminal statute can make criminal a special class of criminal conduct not directly focused on by the federal criminal statute, then the government may assimilate the state criminal statute and prosecute the defendant under it. This is a misreading of the ACA itself and a clear misunderstanding of Congress' intent in enacting the ACA and the holdings of this Court in interpreting whether the ACA permits a federal prosecution to assimilate a state criminal statute when a similar federal criminal statute proscribes and punishes the same conduct. Petitioner contends that this interpretation of the ACA and its "harmonization" with federal law is inconsistent with this Court's holdings in *Williams v. United States*, 327 U.S. 711 (1946) and *United States v. Sharpnack*, 355 U.S. 286 (1958). In essence, the government's position would allow a federal

prosecutor to prosecute a defendant under an assimilated state criminal statute if that state criminal statute re-defines, enlarges, or somehow classifies the criminal conduct differently from its federal counterpart. The implication of the government's argument is that not only does it have the right to charge and prosecute under an assimilated state criminal statute, but it can choose whether to charge or prosecute under federal or state criminal law, depending on what result it desires to achieve. Obviously, this was never the intent of the ACA, and to hold that such a choice is available due to technical differences between a federal and state criminal statute renders the ACA and the federal criminal statute meaningless.

A. The Phrase "Act or Omission" in the ACA Refers to the Conduct of the Defendant Sought to Be Punished and Not to a State Law Offense.

The Assimilative Crimes Act, 18 U.S.C. § 13(a) provides:

"Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title . . . is guilty of any *act or omission* which, although *not made punishable by any enactment of Congress*, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment." (Emphasis added)

A plain reading of the ACA reveals that the words "act or omission" refer specifically to the conduct of the defendant sought to be punished and not to the state law offense that supports an ACA charge. Before the federal prosecutor can consider assimilating a state criminal statute, he or she must first look at the conduct of the defendant and determine whether there is an appropriate federal criminal statute which proscribes or prohibits that conduct. If that conduct is prohibited by a federal criminal statute, the defendant is charged under federal law

with a violation of the applicable statute. The inquiry ends there. However, if there is *no* federal criminal statute which prohibits or proscribes the conduct of the defendant, the prosecutor may assimilate an appropriate state criminal statute and prosecute the defendant under that state statute. Only if there is no federal criminal statute proscribing the conduct sought to be punished can the federal prosecutor assimilate a state criminal statute. If both federal and state criminal statutes proscribe the same conduct, the government must prosecute under the federal criminal statute.

This is consistent with the intent and purpose of the ACA, and the interpretation of the ACA by this Court. "There is, plainly, no delegation to the States of Authority in any way to change the criminal laws applicable to places over which the United States has jurisdiction." *Franklin v. United States*, 216 U.S. 559, 569 (1909).

The ACA was enacted by Congress, and subsequently re-enacted, to fill in the gaps in federal criminal law by assimilating state criminal laws in prosecutions for crimes committed against the United States on lands under its special maritime and territorial jurisdiction, when no federal criminal law existed. Therefore, rather than enacting a whole body of federal criminal law, Congress passed the ACA to fill in the gaps in federal criminal law by adopting or assimilating a state criminal statute for prosecution, if no federal criminal statute existed. The reasoning and purpose was simple. However, its application has been misunderstood, and in some cases, manipulated for other purposes. The rationale of the Assimilative Crimes Act is simple: to not allow persons to commit crimes on lands under the exclusive jurisdiction of the United States and go unpunished merely because Congress had not enacted a federal criminal statute proscribing that particular conduct.

To take the government's position and extend it further would mean that federal substantive criminal law would be subject to modification by reference to state

criminal law. The federal Constitution specifically empowers Congress to enact federal laws proscribing acts or conduct occurring on lands under its exclusive jurisdiction. Each individual state is also entitled to enact criminal statutes proscribing certain conduct and punishing that conduct on lands under its exclusive jurisdiction. Each sovereign (the state and the federal government) is free to legislate and enforce its own laws as long as they do not infringe on the other's sovereignty. Simply put, this is the basic principal of federalism. The states cannot change the federal criminal laws applicable to lands over which the federal government has exclusive jurisdiction.

In *Williams, supra*, this Court held that a man could not be charged under an assimilated Arizona criminal statute for conduct which occurred on land under exclusive federal jurisdiction (an Indian reservation) when a federal criminal statute proscribed and prohibited similar general conduct. The Arizona statute provided that a person could be found guilty of statutory rape if a male had sexual intercourse with a female (to whom he was not married) under the age of eighteen. However, the analogous federal criminal statute of carnal knowledge provided that the age of consent was sixteen. This Court held that the ACA did not make the Arizona statute defining statutory rape applicable because the "precise act" (the "act or omission") upon which the conviction depended (carnal knowledge) had already been made penal by an act of Congress. The fact that the Arizona statute more broadly defined the crime (age of consent being 18 years rather than 16 years under the federal statute) could not be used to enlarge the scope of the federal offense by application of the ACA.

This is what the government intends to do in the case at bar: redefine the federal murder statute in terms of the Louisiana murder statute. The Louisiana homicide statutes are similar in purpose and scope to those of its sister states and to the federal homicide statutes; it classifies murder into varying degrees and prescribes different pun-

ishments for the various degrees of murder. The government's argument suggests that if the Louisiana first degree murder statute defines the crime differently from the federal murder statutes, the government has the right to assimilate the state criminal statute and prosecute under state law rather than under the federal criminal statute. Whether the government argues that the Louisiana murder statute proscribes a different "class of conduct" or specifically seeks to deter child abuse, does not make the conduct any different from that proscribed by the federal murder statute.

Sharpnack, supra, stands for the proposition that a subsequently enacted federal criminal statute precludes the assimilation of a state criminal statute pursuant to the ACA. In other words, if at one point in time there was no federal criminal statute, the state criminal statute would supply the definition of the crime and the punishment for the proscribed conduct. However, once Congress subsequently enacts a statute defining and proscribing the conduct which had previously been proscribed and defined by an assimilated state law, the federal statute "occupies the field" and "preempts" the assimilation of the state statute. Once a subsequent federal criminal statute is enacted by Congress, the federal prosecutor can no longer prosecute under a previously assimilated state criminal statute; the prosecution must rest upon the newly enacted federal statute. The issue of the applicability of the ACA is not how the crime is defined or whether there are technical differences between the federal and state criminal statutes, but whether the federal criminal statute proscribes the same conduct as does the state criminal statute. If the federal criminal statute applies, the prosecution must be based upon it and not on a state criminal statute.

The Louisiana homicide statute defines and classifies the conduct that constitutes first degree murder differently than the federal homicide statute. However, these differences are technical distinctions between what conduct or acts constitute the offense of first degree murder as op-

posed to second degree murder or manslaughter. These differences between federal murder and state first degree murder center on what acts constitute that specific class of offense, and what aggravating circumstances are present or absent in that classification for purposes of punishment. The federal first degree murder statute specifically proscribes the killing of a human being, including a child under the age of twelve years. The federal criminal statutes proscribe, define, and punish the conduct, "act or omission," and/or offense of murder. That federal legislation occupies the field, and a state criminal statute cannot be assimilated to modify or displace it. The purpose of the Assimilative Crimes Act is merely to make sure that a person does not commit an offense on federal property and go unpunished. (See, *United States v. Press Publishing Co.*, 219 U.S. 1, 12 (1910) in quoting Mr. Justice Story who helped draft portions of the 1825 Act which is essentially the same act as the ACA today.)

The Court of Appeals for the Fifth Circuit held that the government cannot assimilate a state criminal statute in a federal prosecution when a federal criminal statute proscribes the same conduct sought to be punished under state law. "Act or omission" under the ACA clearly refers to the criminal conduct which is sought to be proscribed and punished. The government argues that the Louisiana first degree murder statute defines murder of a child under the age of twelve years as a different class or category of murder than the federal degree murder statute; as such, the conduct for which petitioner was charged is not specifically proscribed by the federal murder statutes. Therefore, the state criminal law may be assimilated.

This argument falls of its own weight. The act or conduct sought to be prosecuted, and for which petitioner was tried, convicted and punished was for the murder of Jadasha D. Lowery, her four year old step-daughter. 18 U.S.C. § 111(a) defines, proscribes, and punishes the conduct known as murder. The statute classifies

(defines) first degree murder and second degree murder and it specifies the punishment for each depending on what aggravating circumstances are present or absent. The government makes the argument that the conduct being punished in this case is "child murder" which is somehow a different category of conduct from murder as defined by the federal murder statute. The federal murder statute does not classify or define the degrees of murder by the age of the victim. However, the Louisiana first degree murder statute does differentiate the crime of first degree murder from second degree murder due to the age of the victim,¹ by status² and whether the murder occurred during the perpetration or attempted perpetration of another crime.³ Does the act of murder of a person under the age of twelve require a different type of conduct or create a different crime from the act of murder of a person who is over the age of twelve? The act (crime) of murder covers all persons regardless of age. Like the Arizona statute involved in *Williams*, *supra*, this Court has held that merely because a state statute redefines or enlarges the crime differently than the federal statute does not trigger the use of the ACA to prosecute under state law, provided that a federal criminal statute prohibits the conduct. The issue here is whether the conduct of murder is prohibited by the federal murder statutes and not whether the victim is of a certain age or within a certain class of persons. It does not change the argument for the government to suggest that by categoriz-

¹ 14 La. Rev. Ann. § 30A(5). "When the offender has the specific intent to kill or to inflict great bodily harm upon a victim under the age of twelve or sixty-five years of age or older."

² 14 La. Rev. Stat. Ann. § 30A(2). "When the offender has a specific intent to kill or to inflict great bodily harm upon a fireman or peace officer engaged in the performance of his lawful duties."

³ 14 La. Rev. Stat. Ann. § 30A(1). "When the offender has specific intent to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, second degree kidnapping, aggravated escape, aggravated arson, aggravated rape, forcible rape, aggravated burglary, armed robbery, drive-by shooting, first degree robbery, or simple robbery."

ing the murder of a child as first degree murder under Louisiana law, the state is prohibiting and punishing specific conduct not made criminal by the federal murder statute. A similar argument was rejected by this Court in *Davis v. Utah Territory*, 151 U.S. 262 (1893):

This obligation is based in part, upon the theory that murder in the first degree and murder in the second degree are made distinct, separate offenses. But this is an erroneous interpretation of the statute. The crime defined is that of murder. The statute divides that crime into two classes in order that the punishment may be adjusted with reference to the presence or absence of circumstances of aggravation. [151 U.S. 262, 266 (1893)]

The classification of murder into different degrees, whether it be under the federal homicide statutes or state homicide statutes, is merely to rank this proscribed conduct into different classes to be subject to different punishments. This does not create a new specific offense of "child murder" which is not prohibited by federal criminal law.

B. The Offense of "Child Murder" Under Louisiana Law Is Certainly Made Punishable by the Federal Murder Statute.

The crucial question in this case is whether "child murder" as defined by Louisiana law is an offense made punishable by an enactment of Congress (and whether the government may invoke the ACA to assimilate the Louisiana first degree murder statute). The federal homicide statute proscribes and makes criminal the murder of "a human being." A human being may be of any age and includes those under the age of twelve as described in the Louisiana first degree murder statute and those over the age of twelve. It is logically insupportable to argue that the federal first degree murder statute does not proscribe and make criminal the murder of a human being (a child) under the age of twelve. The government, in brief, states "thus, the 'single offense' with which

petitioner was charged and convicted was child murder—a sub-category of first degree murder as defined by Louisiana law." (Reply br. 24) The argument furthered by the government is that the correct standard of reviewing whether this crime was made punishable by a federal statute is whether Congress directly focused on the specific class of conduct of murder of a child under the age of twelve. This analysis is unsound. The federal murder statutes proscribe and punish the crime of murder whether the victim is under the age of twelve or over the age of twelve. Under Louisiana law, murder of a human being under the age of twelve is not a "sub-category" of first degree murder as argued by the government, and it is not some separate and distinct offense not proscribed by the federal murder statutes. In Louisiana, the age of the victim is determinative for purposes of an enhanced penalty under the Louisiana first degree murder statute (the death penalty or life imprisonment without parole); an enhanced penalty due to a vulnerable victim is provided differently in the federal sentencing guidelines by an upward adjustment in the base offense level pursuant to § 3A.1.1 of the sentencing guidelines. No new and separate crime is created, only a more severe penalty is imposed. This is consistent with Louisiana law: ". . . the fact that a victim is under the age of twelve is now a statutory aggravating circumstance." *State v. Weiland*, 505 So.2d 702 (La. 1987), (Footnote omitted.) *Williams*, supra, found that state statutes cannot re-define or enlarge, or in this manner, sub-categorize federal law in order to invoke the ACA. If the prosecution should be allowed to invoke the ACA in light of "Congress' intent to minimize differences between the criminal law applicable to federal enclaves and those of surrounding areas," as the government contends, then why would Congress enact any federal criminal statutes whatsoever? The government's purpose is not to prosecute state crimes, but to prosecute criminal conduct against it on land under its exclusive jurisdiction. The exception to the rule is that if there is no federal criminal statute proscribing the conduct, then the assimilation of a state criminal statute is

permissible to prevent that conduct from going unpunished.

The government contends that the ACA's purpose is to promote conformity between state and federal criminal laws. That is true to the extent that it allows assimilation of and prosecution under state criminal statutes to prevent crimes occurring on federal enclaves from going unpunished. However, at no time does this conformity mean that if a federal criminal statute and a state criminal statute proscribe the same conduct, but the statutes differ in scope or punishment, the government has the right to decide which criminal statute to apply. To allow the federal prosecutor to charge and prosecute a defendant under the ACA with a state criminal statute may interfere little with the authority of the states regarding the definition of and the punishment of crimes committed within its borders. However, this prosecution under a state law thwarts Congress' intent that crimes against the federal government occurring on lands under its exclusive jurisdiction be punished under federal law. There is no federal interest secured by carrying on a prosecution based on an assimilated state criminal law when an appropriate federal criminal statute exists, nor does that prosecution further any legitimate state interest. The crime is against the government and not the state. It appears that the government wants this Court to hold that if a federal criminal statute does not proscribe *the exact act* or does not *define* the prohibited criminal act exactly as the state statute does, or does not provide the exact same punishment as the state statute, then the conduct is not the same precise conduct sought to be prohibited; and, therefore, the Assimilative Crimes Act allows the assimilation of and prosecution under a state criminal statute.

By their nature, criminal statutes differ in definition and punishment from one state to another and from their federal counterparts. The question is what criminal conduct is being prohibited. In this case, it is the crime of murder. Murder is not age specific; it may also include the killing of a child. Merely because the Louisiana

homicide statutes define different groups of persons for which a charge of first degree murder applies is not of any importance to the federal prosecution framework nor does it mean that the federal statute fails to prohibit murder; it merely means that the federal criminal statute categories and punishes this particular act differently than does the state statute. It means that the State of Louisiana has chosen to punish the killing of a child under the age of twelve by ranking that act in the class of acts described as first degree murder, which may receive a more severe punishment. However, the federal statute does not classify the degree of murder by reference to the age of the victim. It is clear that the federal statute encompasses all of the elements of murder of a child, including those who happen to be under the age of twelve. To argue that the ACA allows a federal prosecution under an assimilated state criminal statute when the only difference between that state statute and its federal counterpart is how each statute defines the degree of murder and the presence or absence of aggravating circumstances related to punishment, is unrealistic. Each sovereign is entitled to define and punish "acts or omissions" against it as it sees fit. This Court, in *Williams*, *supra*, found that:

[t]he fact that the definition of this offense as enacted by Congress results in a narrower scope for the offense than that given to it by the State, does not mean that the Congressional definition must give way to the State definition. (327 U.S. 711, 717-18)

Congress, at any time, may re-define the crime of federal first degree murder and second degree murder. Likewise, a state may, at any time, re-define or change the elements of and punishment for its crimes. If we assume the government's position to be correct, then any time a state re-defines or changes its criminal statute, the corresponding federal statute would not then cover that precise act (crime). This position is flawed logically and in its application. By logic, this possibility was rejected by this court in *Sharpnack*, *supra*. There, this Court held that

if Congress enacts a federal criminal statute covering conduct on lands under its exclusive jurisdiction, the previously assimilated state laws are excluded from the field and the prosecution must then rely on those federal statutes. 355 U.S. 289 (1958). (See, particularly note 5 at p. 289 which specifically lists the federal murder statute as a re-enactment which excluded state murder laws from the field.) The government argues that the "precise act" which is used to determine whether the ACA allows the assimilation of a state criminal statute is directed toward the way that the criminal act is defined. The "precise act" test which has been approved by this Court goes toward the conduct that is sought to be punished. The Assimilative Crimes Act, in the same way, looks at the "act or omission" to determine whether federal law or state law applies. Clearly, the federal homicide statutes proscribe and prohibit the precise act, murder itself. Like the Louisiana homicide statutes, the federal statutes classify murder into different degrees and provide varying punishments for each of the different classes of murder. Merely because a state statute defines and punishes murder in different ways and in different degrees in no way changes the precise act or conduct sought to be prohibited by the federal statute.

The petitioner, DEBRA FAYE LEWIS, was charged with the murder of Jadasha Lowery. The precise act, the "act or omission," sought to be punished is the murder of a human being. Just because the Louisiana first degree murder statute defines first degree murder to include a human being under the age of twelve, does not make the murder itself some specific conduct not proscribed by the federal murder statute. The state definition merely seeks to specify a class of persons for which the charge of first degree murder applies and on whom a more severe punishment is imposed. Classification of murder into degrees or classes, does not create some separate or distinct conduct from murder in general.

C. Federal Prosecutors Cannot Assimilate a State Criminal Statute in Order to Obtain a More Severe Penalty for an Act Which Is Punished by a Federal Criminal Statute.

Petitioner contends that the reason the government assimilated the Louisiana first degree murder statute was to ensure a more severe sentence upon conviction, than provided by federal law. Both the federal murder statute and the Louisiana murder statute defines the degrees of murder and the punishment for each offense. However, the Louisiana first degree murder statute creates classes of persons for which the first degree murder statute applies irrespective of whether that crime would otherwise be second degree murder. In other words, you may be charged with, convicted of, and punished for first degree murder under Louisiana law for an act that would otherwise be second degree murder under Louisiana law, but for the fact that the victim is under the age of twelve. The federal first degree murder statute does not define degrees of murder by the age of the victim. The federal first degree murder statute makes the conduct of killing of a human being criminal, regardless of age. It is obvious that the federal homicide statutes encompass and make criminal the conduct which includes the murder of a child under the age of twelve. For the government to argue that because the Louisiana first degree murder statute somehow punishes the specific conduct of "child murder", this conduct is not otherwise punished or proscribed by federal law is erroneous.

The real purpose behind the federal prosecution's assimilation of the Louisiana first degree murder statute is to obtain an enhanced penalty in the sentencing phase of the prosecution. The record indicates, and the Fifth Circuit held, that there was insufficient evidence to convict DEBRA FAYE LEWIS of federal first degree murder. The federal prosecutor was aware of those facts prior to the indictment being handed down. Even if indicted for federal first degree murder, it was obvious that a conviction on that

charge would not be supported by the evidence, and, if obtained, would not survive an appeal. A review of the sentencing guidelines reveals the disparity in sentences between federal first degree murder (death, life imprisonment without parole) and second degree murder (168-210 months imprisonment, including a two level upward adjustment for a vulnerable victim). However, by charging petitioner with first degree murder under Louisiana law, she was subjected to life imprisonment without parole. A responsive verdict of second degree murder under Louisiana law carries a mandatory sentence of life imprisonment without parole. Section 5G1.1 of the sentencing guidelines in conjunction with 18 U.S.C. § 3553(b) provide that the sentence based upon an assimilated state statute should most closely approximate the state punishment rather than the sentencing guideline range. Therefore, the reason for assimilating the Louisiana first degree murder statute was to ensure a more severe punishment than what could reasonably be anticipated by a prosecution under federal law. The assimilation of the Louisiana criminal statute was not to prosecute conduct not made criminal by federal law, but to seek a more severe penalty not provided by federal law.

The ACA does not allow a federal prosecutor to statute shop in order to more easily secure a conviction for the proscribed conduct or to obtain a more severe punishment than what is available under the applicable federal criminal statute. In order for the prosecutor to assimilate the Louisiana first degree murder statute, there must not be a federal criminal statute which prohibits or proscribes the conduct which is sought to be prosecuted and punished. This is not the case here. The federal homicide statutes clearly prohibit and proscribe the conduct of murder of a human being, regardless of age, in a similar manner as the Louisiana statutes do. The clear intent in this case was to ensure that DEBRA FAYE LEWIS be convicted of Louisiana first degree murder, and a sentence of life imprison-

ment be imposed upon her pursuant to the sentencing guidelines.

Furthermore, the prosecution and sentencing of a defendant through an assimilated state criminal statute when a similar federal criminal statute exists, is contrary to the separation of powers between the federal government and the individual states. Each state is allowed to enact its own criminal statutes and punishments for their violation provided that these statutes do not violate the federal Constitution. The federal government, through acts of Congress may enact its own federal criminal statutes and punishments for acts against it as long as they do not violate the federal Constitution. If the Louisiana statute in this instance more severely punishes an individual for murder than does the corresponding federal criminal statute, and if the enhanced punishment is based upon the age of the victim, this alone does not make the conduct separate, distinct, or different from the conduct prohibited by the federal criminal statute. The proscribed conduct is the same: murder of a child, but the punishment is enhanced in the Louisiana statutory scheme by defining it as a more serious offense, first degree murder, as opposed to second degree murder subject to an upward adjustment of the base offense level, and ultimately the sentence, due to a vulnerable victim, under the federal sentencing guidelines. How can the government argue that the Louisiana first degree murder statute punishes "child murder" but the federal murder statute doesn't? How can the government contend that the "specific act" of child murder is not covered by the federal homicide statutes? It cannot! The government argues that because petitioner in brief stated that "the government could have prosecuted the defendant under the federal second degree murder statute and assimilated the state cruelty to juveniles statute as a separate charge had it so desired," Pet. Br. 18, she somehow "acknowledges that a state law offense may be prosecuted under the ACA even where the general conduct also violates a federal statute." Resp. Br. 24. The Louisiana

child abuse statute is not the same as, nor does it proscribe the same criminal conduct as the Louisiana first degree murder statute. The cruelty to juvenile statute is directed at punishing the specific crime of child abuse, not murder. The Louisiana first degree murder statute does not seek to prevent child abuse or punish it, but seeks to more severely punish the act of murder if the victim is under the age of twelve. These statutes are directed at separate and distinct conduct: one is to protect children and one is to determine in what types of murder the death penalty applies. In this case, there is no lack of a federal criminal statute which prohibits the precise act (the murder of a child). Therefore, the prosecution must be based on the appropriate federal criminal statute.

The difference between the federal criminal statute and the Louisiana criminal statute is that the Louisiana statute for purposes of sentencing automatically imposes a greater sentence (death or life imprisonment without parole) on a person who is found guilty of murdering someone under the age of twelve. Under federal law, no such distinction is made. However, under the correct circumstances, the exact same punishment is available under the federal first degree murder statute. The difference is that, unlike the Louisiana statute, it is not automatic because the victim is under the age of twelve years. The government improperly and incorrectly characterizes the "precise act" sought to be punished, the murder of a child under the age of twelve, as not being prohibited by federal law. For the government to argue that somehow the Louisiana murder statute proscribes conduct not made criminal by the federal homicide statutes is without merit.

It is clearly obvious that murder under federal law and murder under Louisiana law are the same thing. The only distinction is different classification of degrees of murder which is related solely to sentencing. It is an impermissible assimilation of a state criminal statute merely to accomplish a sentencing goal which is not provided by federal law. The Court of Appeals for the Fifth Circuit correctly

held that the government improperly assimilated the Louisiana first degree murder statute in its prosecution of petitioner, DEBRA FAYE LEWIS. That portion of the Fifth Circuit's opinion should be affirmed.

II. IF THIS COURT AFFIRMS THE HOLDING OF THE FIFTH CIRCUIT COURT OF APPEALS THAT THE ASSIMILATION OF LOUISIANA LAW WAS IMPROPER, THE CASE SHOULD BE REMANDED FOR RESENTENCING FOR THE FEDERAL OFFENSE OF SECOND DEGREE MURDER IN ACCORDANCE WITH THE FEDERAL SENTENCING GUIDELINES.

The United States Court of Appeals for the Fifth Circuit correctly held that the assimilation of the Louisiana first degree murder statute was improper. The Court of Appeals further held that there was sufficient evidence adduced at trial to convict the petitioner, DEBRA FAYE LEWIS of the federal offense of second degree murder and it entered a judgment of guilt of federal second degree murder.

Once the Court of Appeals found that the assimilation of the Louisiana first degree murder statute was improper, the options of the court were to reverse and vacate the conviction and sentence under the Louisiana first degree murder statute, and remand the proceedings for a new trial, or to affirm the conviction of the federal offense of second degree murder and remand the proceedings to the District Court for resentencing in accordance with the sentencing guidelines. The Fifth Circuit found that it was unnecessary to remand petitioner for sentencing because the sentence imposed by the District Court was within the maximum sentence provided by statute. This was clear error on the part of the Fifth Circuit.

The Fifth Circuit relied upon *Hockenberry v. United States*, 422 F.2d 171 (9th Cir. 1970) for the proposition that only if the indictment could not support the sentence, a remand for resentencing was necessary. The Court also relied upon *United States v. Hall*, 979 F.2d 320 (3rd Cir.

1992) to deny a remand for resentencing because the sentence imposed upon the defendant was not greater than which could have been imposed under the statute. The Fifth Circuit did not apply the sentencing guidelines to this case despite the fact that their application to federal offenses is mandatory. The Fifth Circuit's holding that the sentence imposed upon petitioner did not exceed the statutory maximum, and, therefore did not exceed the maximum sentence provided by statute is contrary to the holdings of this Court in *United States v. R.L.C.*, 503 U.S. 291 (1992) and *United States v. Granderson*, 511 U.S. 39 (1994). In both of those cases, petitioner contends that the definition of the statutory maximum sentence has been construed to mean the maximum sentence determined under the federal sentencing guidelines as applied by 18 U.S.C. § 3553(a)(4).

In the case at bar, the base offense level for second degree murder is a level 33, pursuant to U.S.S.G. § 2A1.2. An upward enhancement of two (2) levels to the base offense level for a vulnerable victim is permitted by U.S.S.G. § 3A1.1 increasing the base offense level to 35. As previously discussed in the brief of petitioner, Ms. Lewis' criminal history category was I, which under the sentencing guidelines produced a sentencing range for federal second degree murder from 168 to 210 months. Therefore, it is contended by petitioner that the maximum term of imprisonment applicable to the crime for which she was convicted is 210 months. However, the Fifth Circuit affirmed the sentence of life imprisonment without parole stating that the sentence did not exceed the statutory maximum provided by 18 U.S.C. § 1111(a). The minimum base offense level required to sustain a life imprisonment sentence under the guidelines is level 43, some eight base offense levels higher than what petitioner could receive for second degree murder.

The Fifth Circuit's holding that no remand for resentencing was necessary because the sentence imposed by

the District Court did not exceed the maximum sentence the defendant could have received under the applicable federal statute for second degree murder is erroneous. Under the federal sentencing scheme, the sentence is determined by application of the sentencing guidelines which is mandatory under 18 U.S.C. § 3553. As such, the Fifth Circuit's affirmance of a sentence of life imprisonment without parole violates 18 U.S.C. § 3553(b) and requires this court to vacate the sentence and remand the proceedings to the District Court for resentencing. It is obvious from reading the sentencing transcript and record of this matter that the District Court imposed a sentence based upon a sentencing guideline which did not apply in this case. Furthermore, the District Court imposed a sentence which was eight base offense levels above the applicable sentencing guideline range for the crime which the Fifth Circuit found petitioner guilty. The Fifth Circuit never applied the sentencing guidelines in determining petitioner's sentence.

A sentence of life imprisonment without parole exceeds the maximum sentencing guideline range for the crime of federal second degree murder upon which petitioner was convicted. To allow a sentence of life imprisonment to stand imposes an excessive sentence upon the defendant for the crime of which she was convicted. It must be remembered that the District Court imposed the life imprisonment sentence after determining the applicable sentencing guideline for a conviction of Louisiana first degree murder was the sentencing guideline for federal first degree murder: § 2A1.1. The sentence exceeded the statutory maximum guideline range for federal second degree murder. The sentence which was affirmed by the Fifth Circuit should be vacated and this matter remanded to the Fifth Circuit with an instruction that it should vacate the sentence of life imprisonment without parole and that this matter be remanded to the District Court for resentencing for federal second degree murder in accordance with the sentencing guidelines.

CONCLUSION

The opinion of the Fifth Circuit holding that the assimilation of the Louisiana first degree murder statute was improper should be affirmed.

The decision of the Fifth Circuit finding that the petitioner is guilty of the crime of federal second degree murder based upon an invalid indictment should be reversed and vacated and the matter remanded for a new trial. However, if this Court finds that the entry of a judgment of conviction of petitioner for federal second degree murder is proper under the evidence proven at trial and as found by the Court of Appeals, then the Fifth Circuit erred in refusing to vacate the sentence of life imprisonment without parole and remand this matter to the District Court for resentencing due to its failure to apply the sentencing guidelines to the conviction. The application of the sentencing guidelines to a federal offense is mandatory. The failure to apply the sentencing guidelines and to impose a sentence which is within the statutory maximum, but which exceeds the maximum provided by the applicable sentencing guidelines is error.

If this Court finds that the conviction of petitioner for federal second degree murder is proper, the sentence of life imprisonment without parole should be vacated and this matter remanded to the Fifth Circuit with instructions to vacate the sentence of life imprisonment without parole and to remand the case to District Court for resentencing in accordance with the federal sentencing guidelines.

Respectfully submitted,

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